No. 12,298

IN THE

United States Court of Appeals

For the Ninth Circuit

ALASKA STEAMSHIP COMPANY (a corporation),

Appellant,

vs.

M. P. MULLANEY, Commissioner of Taxation, Territory of Alaska,

Appellee.

BRIEF OF AMICUS CURIAE.

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No. 12,298

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Alaska Steamship Company (a corporation),
Appellant,

vs.

M. P. Mullaney, Commissioner of Taxation, Territory of Alaska,
Appellee.

BRIEF OF AMICUS CURIAE.

PRELIMINARY STATEMENT.

Pursuant to leave of this court, this brief is filed on behalf of Alaska Packers Association as amicus curiae.

This appeal is concerned with the validity under the Constitution and laws of the United States of the Alaska Net Income Tax Act (Session Laws of Alaska 1949, Ch. 115), enacted by the Alaska Legislature on March 26, 1949[1]. The Act imposes a net income tax on corporations, fiduciaries, banks and individuals measured by the taxpayer's federal income tax. Similarly, the Act provides

[1]Pertinent provisions of this act are printed as Appendix A to the Brief for Appellant.

for wage withholdings by employers in amounts based upon the amounts withheld pursuant to the provisions of the Internal Revenue Code. Alaska Packers Association, by virtue of its salmon fishing and canning operations in Alaska, is subject to the taxing jurisdiction of the Territory and to the Alaska Net Income Tax Act. Preliminary computations indicate that over 90 per cent of the Association's annual federal income tax will be allocable to Alaska under the terms of the Act. A substantial part of the Association's net income so taxed by Alaska is also taxed by California and other states. The Association is also subject to the withholding provisions of the Act. Because Alaska Packers Association has a direct and substantial financial interest in the determination of the validity of this act, and because we believe that the court below has committed error in the determination of important constitutional questions, application was made to file a brief as amicus curiae.

A number of issues are presented on this appeal. All of these are discussed in appellant's brief. In this brief we respectfully ask leave to consider two of these issues we deem of exceptional importance: (1) The invalidity of the allocation formula of section 5 A (2) under the due process clause of the Fifth Amendment and the interstate commerce clause of Article I of the Constitution, and (2) the invalidity of the Act as an attempt to delegate legislative functions of the Alaska Legislature to Congress.

I.

THE ALLOCATION FORMULA SET FORTH IN SECTION 5 A (2) OF THE ALASKA NET INCOME TAX ACT VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT AND THE INTERSTATE COMMERCE CLAUSE OF ARTICLE I OF THE CONSTITUTION.

A. The decision of the court below.

Section 5 A of the Alaska Net Income Tax Act imposes an income tax on corporations, both foreign and domestic,[2] in the amount of 10 per cent of the taxpayer's federal income tax or, in the alternative, 10 per cent of an allocated portion of the taxpayer's federal income tax. An allocation formula is set forth in section 5 A (2). It apportions to Alaska that portion of a taxpayer's federal income tax which "gross receipts derived from sources within the territory, payroll and value of tangible property located in the territory, bears to the total gross receipts within and without the territory, payroll and value of tangible property within and without the territory." The gross receipts factor in the numerator of this formula is determined in accordance with the provisions of section 5 A (2)(a):

> "(a) *Determination of gross receipts.*—Gross receipts from sources within the territory shall consist of interest, rents, royalties, gains, dividends, all other income, and gross income received or derived in connection with property owned or a business or trade carried on and salaries, wages and fees for

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[2]The tax imposed by section 5 A is also applicable to fiduciaries, banks and resident and nonresident individuals, except individuals whose income from Alaska sources consists solely of wages or salary (who are subject to the tax imposed by section 5 B). The lack of jurisdiction in the Alaska Legislature to impose the taxes prescribed in section 5 A exists with respect to nonresident individuals as well as to foreign corporations.

personal services performed within the territory. *Income received or derived from sales wherever made of goods, wares and merchandise manufactured or originating in the territory shall be considered to be a part of gross receipts from sources within the territory.*"[3]

It was contended before the court below (R. 6) that this allocation formula, allocating to Alaska the income derived from sales wherever made of goods, wares and merchandise manufactured or originating in Alaska, is invalid because it results (1) in the taxation of income not subject to the taxing jurisdiction of Alaska in violation of the due process clause of the Fifth Amendment, and (2) in a tax that burdens interstate commerce in violation of the interstate commerce clause of Article I of the Constitution. The court below, in rejecting these contentions, stated (R. 55):

> "However, not only are plaintiff's operations governed by another formula set forth in Section 5 A (2)(b) but specific provision is also made by Section 5 (2)(c) for cases in which either formula produces inequitable results. Moreover, since it is not shown that the plaintiff belongs to the class referred to in the hypothetical cases * * * it cannot be heard on this ground."

In so holding, the court below thus concludes that the constitutional objections are without merit, and at the same time holds that appellant is not permitted to raise these objections.

We submit that the court's holding with respect to the merits of the objections is unsound, for the reasons here-

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[3]Italics throughout the brief are added unless otherwise indicated.

inafter stated. As to appellant's status to raise the question, it is true that appellant (unlike Alaska Packers Association, in whose behalf this brief is filed, and numerous other foreign corporations subject to the Act) is not governed by the allocation formula set forth in section 5 A (2)(a).[4] However, that formula, allocating to Alaska income received from sales wherever made of goods manufactured or originating in the Territory is an integral part of the taxing scheme enacted by the Legislature—its essential character being manifest by the fact that Alaska is a land of natural resources largely engaged in export, so that the allocation to it of income from foreign sales of goods originating within the Territory materially affects the revenues, and hence the entire structure of the Act. Numerous cases hold that any person subject to a statute may challenge the validity of any provision thereof, where such provision is an inseparable part of the statute,

> "* * * the principle that the constitutionality of an act may not be raised by one not affected by the invalid part does not apply when the entire act, by which he is affected, is rendered unconstitutional by reason of the part which is void" (*McFarland v. City of Cheyenne* (1935) 48 Wyo. 86, 42 P. 2d 413, 416).

And see:

Carmichael v. Southern Coal Co. (1937), 301 U.S. 495, 513;

Smith v. Thompson (1934), 219 Iowa 501, 258 N.W. 190, 193;

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[4]Appellant, a steamship company, is subject to the allocation formula of section 5 A (2)(b) relating to freight and passenger carriers.

McSween v. State Live Stock Sanitary Board of Florida (1929), 97 Fla. 750, 122 So. 239, 243;
People v. Union Bank & Trust Co. (1935), 362 Ill. 164, 199 N.E. 272, 273.

Moreover, appellant put in issue the validity of the Act as a whole, and has argued, and the court below has passed upon, the constitutional objections to this provision. Accordingly, even if this court should decide that this question is not properly before it, we submit it should make clear that it does not approve or affirm that part of the opinion of the court below which passes on the merits of the question.

B. The allocation formula of section 5 A (2) of the Alaska Net Income Tax Act taxes income beyond the taxing jurisdiction of the Territory of Alaska in violation of the due process clause of the Fifth Amendment.

It has been settled by repeated adjudications of the Supreme Court of the United States that a state is without power to tax income of foreign corporations earned beyond its borders and that any attempt to do so offends the due process clause of the Fourteenth Amendment.

Harvester Co. v. Dept. of Taxation (1944), 322 U.S. 435;
Shaffer v. Carter (1920), 252 U.S. 37;
Hans Rees' Sons v. No. Carolina (1931), 283 U.S. 123;
Underwood T'writer Co. v. Chamberlain (1920), 254 U.S. 113;
Travis v. Yale & Towne Mfg. Co. (1920), 252 U.S. 60;
Bass, Etc., Ltd., v. Tax Comm. (1924), 266 U.S. 271;
Conn. General Co. v. Johnson (1938), 303 U.S. 77.

The taxing power of the Alaska Legislature is similarly restricted. The due process clause of the Fifth Amendment is applicable to territories,

Farrington v. Tokushige (1927), 273 U.S. 284,

and imposes upon territorial legislatures the same restrictions that are imposed on state legislatures by the due process clause of the Fourteenth Amendment.

Farrington v. Tokushige (1927), 273 U.S. 284 (supra);
Heiner v. Donnan (1932), 285 U.S. 312;
Coolidge v. Long (1931), 282 U.S. 582.

It is also settled that while a state or territory may, consistent with the jurisdictional requirements of due process of law, tax a foreign corporation on an allocated portion of its total net income, the allocation formula on its face must be reasonably calculated to reach income derived from sources within the taxing state.

Shaffer v. Carter (1920), 252 U.S. 37 (supra);
Underwood T'writer Co. v. Chamberlain (1920), 254 U.S. 113 (supra);
Travis v. Yale & Towne Mfg. Co. (1920), 252 U.S. 60 (supra);
Bass, Etc., Ltd., v. Tax Comm. (1924), 266 U.S. 271 (supra);
Montgomery Ward & Co. v. State Tax Commission (1940), 151 Kan. 159, 98 P.2d 143.

Even if the allocation formula is fair on its face a taxpayer may avoid its application by showing that in the particular circumstances the formula results in the taxation of income derived from sources beyond the territorial limits of the taxing jurisdiction.

Hans Rees' Sons v. No. Carolina (1931), 283 U.S. 123 (supra).

Section 5 A cannot stand if, as we propose to demonstrate, the prescribed allocation formula on its face results in the taxation of income of foreign corporations earned outside Alaska.

The tax imposed by section 5 A is levied upon the net income of *every* corporation. No distinction is made between domestic and foreign corporations nor between foreign corporations engaged exclusively in interstate commerce and foreign corporations engaged in intraterritorial business in Alaska. The allocation formula prescribed in section 5 A (2) is composed of three factors: gross receipts, payroll, and tangible property. Section 5 A (2)(a) provides that the entire net income of a foreign corporation from the sale *wherever made* of goods manufactured or originating in Alaska must be included in the numerator of the formula as gross receipts derived from sources within Alaska. We submit that this provision necessarily allocates to Alaska income which has its source outside Alaska. The Alaska Legislature apparently assumed that the entire income from the sale of goods produced in Alaska is derived from activities carried on in Alaska. Such an assumption disregards the fundamental economic fact that the total cost of acquiring, producing and marketing goods enters into the production of income from the sales of such goods. It is manifest that if part of these costs are incurred outside Alaska, part of the income from the sales is derived from sources outside Alaska.

The application of the statutory formula to Alaska Packers Association, a California corporation, furnishes an apt illustration and is representative of the effect of the statute on all corporations engaged in fishing, mining

and other businessess which obtain or manufacture goods in Alaska for sale elsewhere. Alaska Packers Association engages in fishing and canning operations in Alaska for approximately three months out of the year. All of the salmon packed in Alaska is transported to and is sold in the United States. A part of the pack is labelled and boxed after its arrival in the United States and a large portion of the pack is stored there for varying lengths of time. Substantial expenditures are incurred in selling, storage, labelling and transportation activities in the United States. Also, the company's administrative and accounting offices in Seattle and San Francisco are largely concerned with the sale of the Alaska salmon pack and the gross receipts from the sale of the pack are obviously attributable in part to expenditures incurred in maintaining these offices. Yet, under the allocation formula of section 5 A (2), Alaska Packers Association is required to allocate to Alaska the entire income derived from the sale of its Alaska salmon pack.

The same situation obtains in the case of all other corporations engaged in the fishing or mining business and any other businesses which obtain or manufacture goods in Alaska for sale elsewhere. Like Alaska Packers Association, many of these corporations are foreign corporations, and taxation of the net income of such corporations derived from sources outside Alaska is prohibited by the Supreme Court decisions referred to above.

The vice of the statutory allocation to Alaska of sales wherever made of goods produced in Alaska is emphasized by the fact that the statute allocates to Alaska gross income from all sales made in Alaska, even though the

goods sold were manufactured or originated outside Alaska. The first sentence of section 5 A (2)(a) of the Act provides that gross receipts from sources within Alaska shall consist of "gross income" received in connection with property owned or business or trade carried on within the Territory. In other words, the statute on its face allocates to Alaska sales made therein of goods produced elsewhere and at the same time also allocates to Alaska sales made outside Alaska of goods produced within Alaska. The Alaska Legislature, unlike the Supreme Court of the United States, has failed to recognize that income of a multistate manufacturing or selling business is derived from activities carried on in each of the states or territories in which the business operates. The Alaska Net Income Tax Act is therefore inconsistent with the principle established by the Supreme Court in the cases cited above, namely, that a state or territory has power to tax a foreign corporation only on that portion of the corporation's net income derived from sources within the taxing state.

At least thirty-three states have enacted corporation income tax laws with allocation formulas applicable to foreign corporations which apportion sales or income from sales to the state in which the sale is made, or in which the goods are located, or in which the goods are consumed, or in which the purchaser of the goods resides.

See,

"Problems of Apportionment in Taxation of Multistate Business," by Leonard L. Silverstein (1949) 4 Tax Law Review 207, 259.

The validity of such income tax laws has been upheld by the Supreme Court of the United States.

> *West Pub. Co. v. McColgan* (1946), 27 Cal.2d 705, 166 P.2d 861, affirmed per curiam (1946) 328 U.S. 823.

A foreign corporation manufacturing or obtaining goods in Alaska and selling the goods in any of these thirty-three states will be required to allocate such sales to both Alaska and the state of sale. It is obvious that if the Alaska Net Income Tax Act is held to be valid, foreign corporations carrying on business activities in Alaska will be subjected to extensive and unwarranted double taxation. Moreover, the allocation to Alaska of sales wherever made of goods produced in Alaska is not necessary in order for Alaska to tax the net income of foreign corporations derived from Alaska sources. A foreign corporation engaged in manufacturing, mining and fishing activities in Alaska necessarily will have a substantial payroll and will own substantial amounts of tangible property in the Territory. The payroll and property factors in the allocation formula would therefore apportion to Alaska income derived from investments in the Territory and from business activities carried on there. Also, sales made in Alaska may constitutionally be allocated to Alaska. But, as is recognized by all of the thirty-three states above referred to, some of the income earned by a foreign corporation engaged in manufacturing or producing goods in one state or territory for sale in another is earned in the states in which the sales are made. Such income is properly apportionable to the state of sale and is reached by such state by allocating sales or income from sales to that state.

cf.

"Allocation of Income in State Taxation," Altman and Keesling, p. 124.

So far as our research discloses, the only case that has considered the validity of an allocation formula comparable to that in the Alaska Act is *New Mexico Glycerin Co. v. Gallegos* (1944) 48 N.M. 65, 145 P.2d 995, where it was held that such an allocation formula, if applied to a foreign corporation, would exceed the taxing power of the state. That case involved a New Mexico income tax statute which provided in part as follows:

> "'(b) If the business of such corporation be transacted both within and without this state the tax imposed shall be upon the portion of such entire net income for each taxable year as is derived from sale, wherever made, or (of) products, goods, wares and merchandise, manufactured or which originated in this state * * *'" (p. 996).

The question in that case was whether a domestic corporation was subject to tax on income derived from business activities carried on in another state. The tax authorities argued that under a section of the statute imposing a tax upon the "net income" of every domestic corporation, the taxpayer was subject to a tax on its entire net income, wherever earned, and that the provision quoted above, providing for an apportionment of income, referred only to foreign corporations. The court held that the quoted provision of the statute applied *only* to *domestic* corporations (pp. 996-997),

> "because the State has no power to impose a tax on the income of a foreign corporation derived from business transacted outside the state, even though the

goods, wares and merchandise from which such income is earned are obtained from within the state."

It should be noted that cases involving franchise taxes imposed upon foreign corporations for the privilege of doing *intrastate* business are not in point.

cf.

Harvester Co. v. Evatt (1947) 329 U.S. 416;
Ford Motor Co. v. Beauchamp (1939) 308 U.S. 330.

As pointed out above, (supra, p. 4), the court below sustained the validity of the allocation formula upon the ground that provision is made by section 5 A (2)(c) for cases in which the formula produces inequitable results. We submit that this ruling is untenable. This section provides, merely, that if the allocation formula enacted by the legislature results in a tax which, in the opinion of the Alaska Tax Commissioner, is "larger" than "in equity and good conscience" the taxpayer should be required to pay, the Commissioner may redetermine the tax in accordance with such "processes and formulas as the tax commissioner shall provide."[5]

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[5] "(c) *Apportionment of tax by tax commissioner.*—If the taxpayer, upon petition to the tax commissioner, as provided in Section 13 of this act, conclusively demonstrates that because of other factors, the method of allocation hereinabove provided, results in a larger tax than in equity and good conscience he should have been required to pay, then the tax shall be determined, allocated and apportioned under such processes and formulas as the tax commissioner shall provide, and the tax commissioner may promulgate proper apportionment rules and regulations conformable with this act for general application in similar cases. In the case of two or more organizations, trades or businesses owned or controlled directly or indirectly by the same interest, the tax commissioner is authorized to distribute, apportion, or allocate the tax where such action is necessary to prevent evasion of payment."

The taxing jurisdiction of the Alaska Legislature is limited to the taxation of income derived from Alaska sources, not by taxation in amounts considered by the Commissioner to be equitable and in accordance with good conscience. Moreover, the standard provided by section 5 A (2)(c) is no standard at all. The tax is left to the whim of the Commissioner, under such processes and formulas as in his absolute discretion he may prescribe. The section offends the most elemenary principles forbidding the delegation of legislative powers.

> *Panama Refining Co. v. Ryan* (1935), 293 U.S. 388;
> *Schechter Corp. v. United States* (1935), 295 U.S. 495.

C. The tax imposed in accordance with the allocation formula of section 5 A (2) of the Alaska Net Income Tax Act is a burden on interstate commerce in violation of the interstate commerce clause of Article I of the Constitution.

The interstate commerce clause of Article I of the Constitution is a limitation upon the taxing power of a territory.

> *Territory of Alaska v. Sears Roebuck & Co.* (D. Alaska 1947), 79 F. Supp. 668.

As pointed out above, the allocation formula provided by section 5 A (2)(a) of the Alaska Act includes within the income subject to the Alaska tax income from all sales made outside Alaska of goods produced within Alaska. Such a formula involves no apportionment at all. It measures the tax by the taxpayer's entire volume of business outside Alaska which is necessary to the shipment and sale of its merchandise in interstate commerce (see *Gwin, etc., Inc. v. Henneford* (1939) 305 U.S. 434, 437). Clearly

such a tax is invalid as a burden on interstate commerce. As pointed out by the Supreme Court in the *Henneford* case, just cited (p. 439):

> "Here the tax, measured by the entire volume of the interstate commerce in which appellant participates, is not apportioned to its activities within the state. If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, though nominally local, thus in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed."

And see:

Adams Mfg. Co. v. Storen (1938), 304 U.S. 307;
Freman v. Hewit (1946), 329 U.S. 249;
Greyhound Lines v. Mealey (1948), 334 U.S. 653;
Memphis Natural Gas Co. v. Stone (1948), 335 U.S. 80.

II.

THE ALASKA NET INCOME TAX ACT IS INVALID BECAUSE IT ATTEMPTS TO DELEGATE TO CONGRESS LEGISLATIVE FUNCTIONS OF THE ALASKA LEGISLATURE.

The Alaska Net Income Tax Act is completely dependent upon the provisions of the Internal Revenue Code. Section 5 A of the Act imposes a tax equal to 10 per cent of the total income tax (or allocated portion

thereof) "that would be payable for the same taxable year to the United States under the provisions of the Internal Revenue Code, without the benefit of the deduction of the tax payable hereunder to the territory." Section 5 B levies a tax "in the amount of ten percent of the tax deducted and withheld under the provisions of subchapter (D), Chapter 9, of the Internal Revenue Code." Section 7 requires every individual (except employees whose sole income in Alaska consists of wages or salary), fiduciary, partnership, corporation and bank "required to make a return under the provisions of the Internal Revenue Code" to make a return under the Act. Also section 7 requires that the amount of tax initially paid under the Act shall be based upon the amount of tax shown on the original federal income tax return of the taxpayer for the taxable year. Finally, section 7 D provides that the rules and regulations established by the Tax Commissioner of Alaska with respect to the credit and refund of overpayments of taxes shall be based upon the provisions of sections 321 and 322 of the Internal Revenue Code in so far as such provisions are consistent with other provisions of the Act.

Section 3 A (8) defines the words "Internal Revenue Code" to mean the "Internal Revenue Code of the United States (53 Stat. 1) as amended *or as hereafter amended.*" Section 3 B provides as follows:

> "(1) Whenever the Internal Revenue Code is mentioned in this act, the particular portions or provisions thereof, as now in effect *or hereafter amended,* which are referred to, shall be regarded as incorporated in this act by such reference and shall have effect as though fully set forth herein.

(2) Whenever any portion of the Internal Revenue Code incorporated by reference as provided in paragraph (1) of this subsection refers to rules and regulations promulgated by the United States Commissioner of Internal Revenue, *or hereafter so promulgated,* they shall be regarded as regulations promulgated by the tax commissioner under and in accord with the provisions of this act, unless and until the tax commissioner promulgates specific regulations in lieu thereof conformable with this act."

In view of the provisions of section 3 A (8) and 3 B, sections 5 and 7 of the Act are clearly invalid as an attempt by the Alaska Legislature to delegate its legislative functions to Congress or the Commissioner of Internal Revenue. The courts have repeatedly held that a state statute which purports to adopt congressional legislation that may be enacted after the effective date of such statute is invalid as an attempt to delegate legislative powers exercisable only by the state legislature.

Hutchins v. Mayo (1940), 143 Fla. 707, 197 So. 495;
State v. Webber (1926), 125 Me. 319, 133 Atl. 738;
Florida Industrial Commission v. State (1945), 155 Fla. 772, 21 So. 2d 599;
State v. Intoxicating Liquors (1922), 121 Me. 438, 117 Atl. 588;
Smithberger v. Banning (1935), 129 Neb. 651, 262 N.W. 492;
Darweger v. Staats (1935), 267 N.Y. 290, 196 N.E. 61;
State v. Gauthier (1922), 121 Me. 552, 118 Atl. 380;
Holgate Brothers Co. v. Bashore (1938), 331 Pa. 255, 200 Atl. 672;

In re Opinion of the Justices (1921), 239 Mass. 606, 133 N.E. 453.

In two cases the courts have been called upon to discuss the very question here in issue, namely, whether a state income tax law imposing a tax measured by a specified percentage of the tax payable under the income tax laws of the United States constitutes an invalid delegation of legislative power.

Santee Mills v. Query (1922), 122 S.C. 158, 115 S.E. 202;

Featherstone v. Norman (1930), 170 Ga. 370, 153 S.E. 58.

In the *Santee Mills* case the state income tax law imposed a tax equal to 33⅓ per cent of the federal income tax imposed by the United States Income Tax Act of November 23, 1921, and acts amendatory thereto " 'which have been passed and approved prior to the time of the approval of this act' " (115 S.E. at p. 205). The court held that the state law did not constitute an invalid delegation of legislative authority because the act did not purport to adopt congressional amendments to the federal income tax law that might be enacted after the effective date of the state act. The opinion makes it clear that the court would have held the statute invalid if it had attempted to embrace any such future amendments, as an improper delegation to Congress of powers reposing only in the state legislature.

Similarly, the court in the *Featherstone* case upheld a state income tax law which adopted certain provisions of the federal income tax laws because "This act in no way

undertakes to make future federal legislation a part of the law of this state upon that subject'' (153 S.E. at p. 70).

The court below recognized that if the principles announced in the foregoing cases were applied, the Alaska Act would be held invalid. But it felt compelled to reject the authority of these cases on the ground, principally, that the Alaska Legislature had no alternative but the one adopted since it meets only once every two years, is not in continuous session, and hence is not in a position to adopt each amendment to the federal laws as it is enacted (R. 53):

> ''Obviously, if the Territorial Legislature were in session continuously, it would be in a position to adopt immediately each amendment to the Federal Laws and Regulations. But since it convenes biennially for a session of sixty days only, there was no alternative but the one to which it resorted.''

Of course, as this court judicially knows, the legislatures of many states meet biennially. This is true in California. Quite apart from the fact that special sessions of the legislature may be called in Alaska, as in the states of the Union, the fact that a legislature meets only once in two years does not render valid an attempt to abdicate its legislative functions.

The court below also relied upon *In re Lasswell* (1934) 1 Cal.App.2d 183, 36 P.2d 678 (R. 53). In that case, the court found that the provision in the California Industrial Recovery Act, that codes adopted by federal authorities under the provisions of the National Industrial Recovery Act should automatically become the California codes, did not constitute an invalid delegation of legislative authority.

The court held that the California legislature had established primary standards for the codes in its own statute and that the delegation to the federal administrative authorities was simply a delegation of the task of filling in details. The case did not involve, and the court did not consider, an attempted delegation of the power to enact changes in substantive law such as that involved in the case at bar.[6]

The court below also held that the objection to the Act as an invalid delegation of legislative power cannot be heard until it is shown that there has been an amendment to the Internal Revenue Code or the Regulations of the Commissioner of Internal Revenue subsequent to the enactment of the Alaska Net Income Tax Act. This holding is directly contrary to the decisions in the cases cited above. The principle which these cases firmly establish is that the legislature of a state or territory is without power to abdicate its responsibilities and authority by providing that Congress shall perform its functions, and that any act so providing, as does the Alaska statute, is invalid *ab initio* because of the attempted delegation. As the Supreme Court of the United States said in *Schechter Corp. v. United States*, 295 U.S. 495, 530:

> "Accordingly, we look to the statute to see whether Congress has overstepped these limitations,—whether Congress in authorizing 'codes of fair competition'

[6]It should also be noted that the position of the court in the *Lasswell* case, that the California Industrial Recovery Act, which was substantially the same as the National Industrial Recovery Act, established sufficient primary standards, is not consistent with the decisions of the Supreme Court of the United States in *Panama Refining Co. v. Ryan* (1935) 293 U.S. 388, and *Schechter Corp. v. United States* (1935) 295 U.S. 495.

> has itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards, has attempted to transfer that function to others."

The principle involved transcends the importance of any particular statute:

> "The question is not of the intrinsic importance of the particular statute before us, but of the constitutional processes of legislation which are an essential part of our system of government" *(Panama Refining Co. v. Ryan,* 293 U.S. 388, 430).

The provisions of the Act incorporating future amendments to the Internal Revenue Code clearly are inseparable. The statute itself demonstrates that the intention of the Alaska Legislature was to impose a continuing tax, measured each year by the federal income tax imposed under the Internal Revenue Code as amended from time to time. Sections 3 A (8) and 3 B (1) and (2), quoted above (supra, p. 16) expressly provide for the incorporation of all future amendments to the Internal Revenue Code; the provisions of section 5 A levy the tax upon persons required to "pay a tax under the federal income tax law" in amounts measured by the total income tax payable *"for the same taxable year* to the United States under the provisions of the Internal Revenue Code" (sec. 5 A (1)); and the administrative provisions of the Act are inseparately connected with similar provisions of the Internal Revenue Code as amended from time to time (sec. 7). There can be no question but that the invalid provisions incorporating future Congressional legislation

"so affect the dominant aim of the whole statute as to carry it down with them" (*Railroad Retirement Board v. Alton R. Co.* (1935) 295 U.S. 330, 362). This is so notwithstanding the separability provision of the Act.

> *Hill v. Wallace* (1922) 259 U.S. 44;
>
> *Railroad Retirement Board v. Alton R. Co.* (1934) 295 U.S. 330 (supra).

And see cases cited at pages 17 to 18, supra.

As stated by the court in *Smithberger v. Banning* (1935) 129 Neb. 651, 262 N.W. 492 (supra), a case involving an attempted delegation to Congress of a state's legislative power (p. 499):

> "The elimination of the invalid provisions of the legislative acts under consideration and the elimination of the invalid appropriation contained in the statutes leave entirely different statutes from those which were passed by the Legislature, so that it cannot be said it would have passed the acts without said void provisions, and the acts must therefore be held void in their entirety. * * * 'Where valid and invalid parts of a legislative act are so intermingled that they cannot be separated in such a manner as to leave an enforceable statute expressing the legislative will, no part of the enactment can be enforced.' "

CONCLUSION.

For each of the reasons above stated, as well as for other reasons discussed in the appellant's brief, we submit the decision below is erroneous and should be reversed.

Dated, San Francisco, California,
October 10, 1949.

Respectfully submitted,
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